

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL GLENN KEEP,

Defendant-Appellant.

UNPUBLISHED

August 21, 2003

No. 240586

Muskegon Circuit Court

LC No. 00-044637-FC

Before: Whitbeck, C.J., and Smolenski and Murray, JJ.

PER CURIAM.

A jury convicted defendant Michael Keep of second-degree murder.¹ The trial court sentenced Keep to 30 to 50 years' imprisonment. Keep appeals as of right. We affirm, but remand for correction of sentence.

I. Basic Facts And Procedural History

The basic facts in this case are not in dispute. At the end of March 2000, Keep became an inmate at the Brooks Correctional Facility in Muskegon County and was placed in a two-person cell in the Eastlake housing unit. The victim, Paul Chmiel, was already housed in that cell. Keep took an immediate dislike to Chmiel, in part because Chmiel was apparently a homosexual. Several weeks later, the sergeant on duty in the Eastlake housing unit, Janice Smith, was notified that Chmiel had failed to show up for his regularly scheduled class that day. Upon investigation, Officers Wade Wakefield and Rodney Brezinski, who were on duty in the Eastlake unit at that time, found Chmiel laying on his back just outside the cell he and Keep shared. Chmiel was not breathing, without a pulse, and with bruises and cuts to his neck and chin. Medical personnel from both the facility itself, and from an ambulance summoned to the facility, attempted to revive Chmiel at the scene, but were unable to do so.

Officers and detectives from the Michigan State Police were called to the prison to investigate Chmiel's death that same afternoon, and that evening Sergeant Gary Miles, together with Sergeant Gary Cuperus, both from the Michigan State Police, interviewed Keep regarding the events surrounding Chmiel's death. As a result of this interview, on the following day, Miles returned to the prison, where he again met with Keep. Keep provided Miles with a signed

¹ MCL 750.316.

written statement regarding Chmiel's death. In this statement, while admitting that he had killed Chmiel, Keep asserted that his actions were the result of provocation on Chmiel's part, specifically, a result of Chmiel propositioning him for sex.

Defendant was subsequently charged with open murder in connection with Chmiel's death, and a jury trial took place between February 13, 2002 and February 20, 2002. At the trial, Michigan Department of Corrections Officers Smith, Wakefield, and Brezinski each testified regarding the circumstances and the condition in which Chmiel's body was found. All three stated that Chmiel was found lying flat on his back just outside his cell, not breathing and without a pulse. In addition, both Smith and Wakefield testified that they observed bruises, discoloration, and cuts on Chmiel's neck and chin at the time he was found, but that Chmiel was not openly bleeding from any wound. While Wakefield admitted that the marks he observed on Chmiel's neck did not resemble finger marks, Smith stated that it appeared that something had been tied around Chmiel's neck because there was horizontal bruising or discoloration across his neck. Both Smith and Wakefield testified that Keep was significantly bigger than Chmiel, outweighing him by about 100 lbs. and standing 4 to 6 inches taller.

With regard to the initial search for Chmiel, Wakefield informed the trial court that, before locating Chmiel's body, he had headed towards the cell shared by Keep and Chmiel to check on Chmiel. Wakefield stated that before he got to the cell, he met Keep walking toward him and that Keep, upon being queried, stated that Chmiel was not in the cell. Wakefield further stated that, shortly thereafter, he opened the cell door from the control panel to allow Keep to enter, that when he then looked back up towards the cell several minutes later he noticed Chmiel's body now lying outside the cell, where he had not seen it previously, and that Keep never attempted to inform prison staff either that he had found Chmiel or that Chmiel required medical attention. Wakefield stated that, to his knowledge, Chmiel did not have an assaultive history.

Kathy Giem and Patricia Sandburg, both registered nurses employed at the Brooks facility, described in detail for the court Chmiel's physical condition at the time he was found and the actions taken by prison staff and medical personnel in the attempt to resuscitate Chmiel. Echoing the testimony of Smith, Wakefield, and Brezinski, both women stated that when they reached Chmiel he was not breathing and had no pulse. Sandburg further noted that Chmiel had discoloration across his neck at the time he was found and that both Chmiel's hands and his forearms were cool to the touch, while Giem testified that in her professional opinion Chmiel was dead by the time resuscitation attempts were begun.

Department of Corrections Sergeant Dale Myers, who was the shift commander on duty at the time Chmiel was found, testified at length regarding the steps taken to secure the crime scene once Chmiel's body was discovered. According to Myers, he requested that Brezinski find Keep, who Myers knew was Chmiel's cellmate, and to bring Keep to him for questioning. Myers further stated that he then secured the cell that Keep and Chmiel shared by locking the cell down and putting yellow tape across the door to prevent anyone from entering the cell until it had been processed by the police and that he contacted the Michigan State Police to initiate an investigation into Chmiel's death. Myers stated that when he observed Chmiel at the time resuscitation efforts were underway, he noticed horizontal bruises on Chmiel's neck. Myers further testified that when Keep was brought to him he looked closely at Keep's physical

condition, including examining Keep's bare skin from the waist up, and stated that he saw no signs of any injury to Keep.

A number of Michigan State Police officers who participated in the investigation at the prison also testified on the prosecution's behalf. Officers Philip Marshall and Shawn Benoit each testified to the details regarding their processing of the cell itself for evidence, while Officers Michael Harris and Gary Cuperus each described their efforts to find and interview witnesses to the events among the other inmates of the Brooks facility. In addition, Michigan State Police Sergeant Gary Miles testified at length regarding his questioning of Keep on the day of Chmiel's death, and regarding the contents of the written statement Keep provided to him. Miles testified that he had read Keep his *Miranda* rights at the beginning of questioning and that Keep had waived those rights and agreed to talk to police. Miles described Keep's initial refusal to admit any knowledge of the events resulting in Chmiel's death, and explained how he subsequently convinced Keep to make a written statement, to be provided the following day. Miles then read the written statement, in which Keep admitted culpability in Chmiel's death but claimed that his actions were provoked by sexual advances made by Chmiel, into the record. Miles stated that, at the time Keep provided him with the written statement on the day after Chmiel's death, Keep admitted remorse that he now had to tell his parents that he had killed someone. Miles stated that Keep had told him that he had not intended to kill Chmiel.

Joyce DeJong, the Chief Medical Examiner for Muskegon County, and the person who conducted the autopsy on Chmiel, testified extensively regarding the condition of Chmiel's body, his injuries, and the cause and manner of his death. According to DeJong, the injuries sustained by Chmiel before his death included cuts under his chin and to the side of his jaw, abrasions on his neck, bruising to the throat area, abrasions to his chest, multiple hemorrhages in the soft tissue of his throat, three broken ribs, and a fracture to his thyroid cartilage (Adam's apple). DeJong further stated that she found pinpoint hemorrhages on each of Chmiel's upper eyelids. DeJong asserted that the injuries that she observed were all consistent with, and suggested, strangulation as the cause of Chmiel's death, and that all indicated that a significant amount of force had been applied to his neck. Upon being presented with a hypothetical, DeJong testified that the injuries sustained by Chmiel were consistent with those that would result from being pressed against the bar of a bunk bed the size of that found in the cells at the Brooks facility. DeJong stated that the time of Chmiel's death would have had to have been in the early afternoon of April 12, 2000, because Chmiel's stomach contents indicated that he had just eaten before he died. DeJong further stated that a person being strangled passes out before dying and that additional pressure to the throat after the person has passed out is necessary in order to cause death. Finally, DeJong stated that Chmiel's death was not the result of natural causes and that she had found no evidence that Chmiel had died in a face-to-face struggle.

The final witness to testify for the prosecution was Ali Muhammad, the assistant resident unit manager in the Eastlake unit of the Brooks facility. Muhammad stated that around 11:45 a.m. on the day Chmiel was killed, Keep met with him to discuss the possibility of changing cells. According to Muhammad, Keep stated that he was tired of Chmiel bugging him to perform sexual acts and wanted to be moved to a different cell. Muhammad stated that he advised Keep he would see if Keep could change cells by the end of the week. Muhammad testified that, although Keep appeared frustrated and upset, he did not seem distressed or angry and he did not request to be placed in administrative segregation.

Keep presented no witnesses of his own and did not testify on his own behalf. At the conclusion of the trial, and after deliberation, the jury found Keep guilty of second-degree murder. Keep now appeals as of right.

II. Sufficiency Of The Evidence

A. Standard Of Review

In reviewing the sufficiency of the evidence, this Court must view the evidence de novo in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.² However, questions of credibility and intent should be left to the trier of fact to resolve.³ Moreover, circumstantial evidence and the reasonable inferences which arise from the evidence can constitute satisfactory proof of the elements of the crime.⁴ Further, all conflicts in the evidence must be resolved in favor of the prosecution.⁵

B. Elements Of Second-Degree Murder

To sustain a conviction for second-degree murder, the prosecution must prove four elements beyond a reasonable doubt: (1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse.⁶ In the present case, Keep has challenged only the sufficiency of the evidence demonstrating that the circumstances under which he killed Chmiel were not such as would mitigate the degree of the offense to manslaughter.

With regard to the question of mitigation, this Court has stated that a homicide may be reduced to voluntary manslaughter if the factfinder determines from an examination of all the circumstances surrounding the killing that malice was negated by adequate and reasonable provocation and the homicide was committed in the heat of passion, where passion means a state of mind incapable of cool reflection.⁷ In determining whether provocation was adequate and reasonable, “ordinary human nature, or the average of men recognized as men of fair average mind and disposition, should be taken as the standard – unless, indeed, the person whose guilt is in question be shown to have some peculiar weakness of mind or infirmity of temper not arising from wickedness of heart or cruelty of disposition.”⁸

² *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

³ *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

⁴ *People v Carines*, 460 Mich 750, 757; 597 NW2d 130, reh den 461 Mich 1205 (1999).

⁵ *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

⁶ *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998), citing *People v Bailey*, 451 Mich 657, 669; 549 NW2d 325 (1996).

⁷ *People v Hopson*, 178 Mich App 406, 411; 444 NW2d 167 (1989), citing *People v Townes*, 391 Mich 578, 589; 218 NW2d 136 (1974).

⁸ *People v Gjidoda*, 140 Mich App 294, 298; 364 NW2d 698 (1985), quoting *Maher v People*, 10 Mich 212 (1862).

Considering the evidence presented at trial in a light most favorable to the prosecution and construing all evidentiary conflicts in favor of the prosecution, we find that the prosecution introduced evidence sufficient to permit a rational trier of fact to conclude that Keep killed Chmiel under circumstances that were not such as would mitigate the degree of the offense to manslaughter. As noted above, Muhammad testified that only several hours before the killing, Keep came to him and asked to be moved to a different cell, explaining that he was tired of Chmiel propositioning him for sex. Muhammad informed Keep that he could probably move to a different cell by the end of the week, and that in the meantime he (Muhammad) was available if things got too difficult to handle. According to Muhammad, although Keep appeared to be frustrated, he did not appear to be distressed or angry. Moreover, Keep did not give any indication that he could not stand to be in the same cell with Chmiel any longer, or that his anger and annoyance had reached a critical point, nor did he request protective custody, which would have removed him immediately from the situation.

Further, Keep's written statement provides strong evidence that the circumstances of Chmiel's death were not such as would mitigate the crime to manslaughter. In his statement Keep admitted not only that he was angry before Chmiel made the proposition which resulted in his death, because "[j]ust [Chmiel's] return from [trying to obtain administrative segregation for himself] had started to piss [Keep] off," but also that he himself initiated the physical altercation with Chmiel by slapping him.

Thus, a significant amount of evidence was introduced to suggest that the circumstances under which Keep killed Chmiel were not such as would mitigate the offense to manslaughter. Looking at this evidence, we find that such provocation as occurred, namely Chmiel's propositioning of Keep for sexual favors following the two men's return from lunch on the date in question, was not such as would provoke a reasonable person under the same circumstances. Accordingly, we hold that the prosecution introduced evidence sufficient to permit a rational trier of fact to conclude beyond a reasonable doubt that Keep killed Chmiel under circumstances that were not such as to mitigate the degree of the offense to manslaughter. As a result, we affirm Keep's conviction on the charge of second-degree murder.

Keep also argues on appeal that, although he was convicted of second-degree murder, the judgment of sentence states that the jury found him guilty of homicide – open murder, and that he is entitled to have the judgment of sentence corrected to accurately reflect the jury's verdict. On this point, we agree and order that this correction be made.

Affirmed. Remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ Michael R. Smolenski
/s/ Christopher M. Murray